IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, ex rel. JAMES F. ALDERSON, Plaintiffs,	)	
v.	)	Case No. 99-413-CIV-T-23B
QUORUM HEALTH GROUP, INC., et al., Defendants.	)	

UNITED STATES' RESPONSE TO
MOTION OF THE AMERICAN HOSPITAL ASSOCIATION
TO APPEAR AS AMICUS CURIAE

On September 3, 1999, the American Hospital Association ("AHA") served a motion for leave to appear in this lawsuit as *amicus curiae* in support of the consolidated motions to dismiss filed by Defendants Quorum Health Group, Inc., *et al.* ("Quorum"). The United States opposes AHA's request on the grounds that AHA's proposed brief is based upon a misunderstanding of the complaint, contains arguments that have been stated adequately by Quorum, sets forth unsupported factual assertions and opinion testimony regarding purported industry practices, and is untimely. Thus, AHA's proposed brief will not be helpful, timely, or otherwise necessary to the Court in considering Quorum's pending consolidated motions to dismiss for failure to state a claim.

For the reasons stated herein, the United States respectfully requests that AHA's motion for leave to appear as *amicus curiae* be denied.

MEMORANDUM OF LAW

I. INTRODUCTION

Medicare cost report regulations[1] impose disclosure requirements upon providers. The regulations state that the "provider must furnish such information to the intermediary as may be necessary to (i) Assure proper payment by the program . . . ." 42 C.F.R. § 413.20(d)(1). [2] In 1996, the Eleventh Circuit applied this

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[1] The regulations provide that:

> (1) The provider must furnish such information to the intermediary as may be necessary to (i) Assure proper payment by the program . . . ; (ii) Receive program payments; and (iii) Satisfy program overpayment determinations.

42 C.F.R. § 413.20(d) (emphasis added).

> (a) Principle. Providers receiving payment on the basis of reimbursable cost must provide adequate cost data. This must be based on their financial and statistical records which must be capable of verification by qualified auditors.
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> (c) Adequacy of cost information. Adequate cost information must be obtained from the provider's records to support payments made for services furnished to beneficiaries. The requirement of adequacy of data implies that the data be accurate and in sufficient detail to accomplish the purposes for which it is intended . . . .

42 C.F.R. § 413.24 (emphasis added).

[2] Pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 552 *et seq.*, this regulation was contained in a notice of proposed rule making dated April

provision in a criminal cost reporting fraud case, United States v. Calhoon, 97 F.3d 518 (11th Cir. 1996), cert. denied, 118 S.Ct. 648 (1997).

In Calhoon, it was alleged that the defendant concealed information related to the reimbursability of certain claimed advertising costs. Id. at 528. Calhoon had "created a second set of books — new general ledgers —" to disguise the true nature of the costs. Id. The court found a duty to disclose in the language of the regulation, stating that

> 42 C.F.R. § 413.20(d) states that "[t]he provider must furnish such information to the intermediary as may be necessary to ... [a]ssure proper payment by the program...." Under the guidelines in the Manual, certain advertising costs are reimbursable and others are not. [citation omitted]. The Manual provides that advertising costs are generally reimbursable if reasonably related to patient care and primarily designed to advise the public of the services available through the hospital and to present a good public image, but not if designed to increase patient census. [citation omitted]. That certain advertising costs are presumptively nonreimbursable obligates a provider seeking reimbursement to identify the costs as "advertising" and to reveal the nature of the advertising. In addition, 42 C.F.R. § 413.20(a) requires providers to maintain financial records for proper determination of reimbursable costs using "[s]tandardized definitions ... that are widely accepted in the hospital and related fields...." Thus, Calhoon had a legal duty to disclose both in the cost reports and in the general ledgers that the costs claimed were in fact "advertising" costs. Instead, he chose to call the costs

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29, 1972. 37 Fed. Reg. 8677. After a lengthy period for comments, the regulation became final on March 9, 1973. 38 Fed. Reg. 6386. It was codified at 42 C.F.R. § 405.406(d)(1) until October 1, 1986, when the regulation was redesignated to 42 C.F.R. § 413.20(d)(1). 51 Fed. Reg. 34790.

> "outreach," thereby concealing the potentially nonreimbursable nature of the costs.

Id. (emphasis added.) Thus, this regulation does not merely impose record-keeping requirements. The Eleventh Circuit stated clearly that 42 C.F.R. § 413.20(d)(1) required providers to disclose "in the cost report" information related to the "potentially nonreimbursable nature of the costs" claimed in the cost report. Id.

On February 24, 1999, the complaint in this action was filed. (Docket No. 1). Plaintiffs alleged that Quorum followed a corporate policy or practice to include in their Medicare cost reports claims for reimbursement that Quorum knew would probably be disallowed if discovered by Medicare program auditors. To reduce the risk of discovery, Quorum's policy or practice was to withhold or conceal information related to these probably non-reimbursable cost items from Medicare auditors. Evidence of this withheld or concealed information is found in Quorum's reserve cost reports, work papers, and summaries. See Complaint ("Complt.") , ¶¶ 69, 75, 77, 86, 172.

Plaintiffs cited to 42 C.F.R. § 413.20(d) and other regulations in support of our assertion that Quorum had a duty to disclose information related to probably non-allowable cost items, whether or not the information was contained in reserve cost records, at the time Quorum filed its Medicare cost reports.[3] See id., ¶¶ 59, 61-

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[3] Plaintiffs did not allege that providers must submit all of their reserve account records with the filed cost report, as AHA suggests in its proposed brief. It is the information related to probably non-allowable costs that must be furnished, not any particular type of document containing such information.

67. One of plaintiffs' theories of liability is that each time Quorum failed to furnish information related to probably non-allowable cost items contained in its cost report, Quorum's certification that the information contained in the filed cost report was true, correct and complete was false and a violation of the False Claims Act ("FCA"). Complt. ¶¶ 59 & 83-93, 324-326.[4/]

On April 15, 1999, Quorum filed its consolidated motions to dismiss the complaint. (Docket Nos. 20, 31). On pages 13-28 of its memorandum (docket no. 31), Quorum addressed plaintiffs' contention that Quorum had a duty to disclose the information contained in Quorum's reserve cost report records at the time the cost report was filed. Some of the arguments advanced by Quorum are similar to those contained in AHA's proposed *amicus* brief.

II. LEAVE MAY BE GRANTED FOR *AMICUS* PARTICIPATION WHERE IT WOULD BE HELPFUL, TIMELY OR OTHERWISE NECESSARY FOR THE ADMINISTRATION OF JUSTICE

While the rules of this Court do not anticipate the filing of briefs by persons appearing as *amicus curiae*, the Court has discretion to grant leave to file such briefs when they would be helpful to the Court and they are timely. United States v. State of Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991) ("[c]lassical participation as an *amicus* to brief and to argue as a friend of the court was, and continues to be, a

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[4/] Plaintiffs also allege that each highlighted item from the reserve cost summaries attached to the complaint constitutes a false claim under the FCA, whether or not Quorum's certifications are found to be false. Complt. §§ 91-93, 312, 321-323. AHA's proposed brief does not address any of the individual false claims alleged in the complaint. See AHA's Proposed Brief, page 2, note 1.

privilege within 'the sound discretion of the court,' depending on a finding that the proffered information of *amicus* is timely, useful, or otherwise necessary for to the administration of justice"). In considering whether to allow participation as an *amicus curiae*, courts have considered factors such as the opposition of the parties, interest of the movants, partisanship, adequacy of the representation, and timeliness. Fluor Corp. v. United States, 35 Fed. Cl. 284, 285 (1996).

Historically, the "purpose [of an *amicus curia*] was to provide impartial information on matters of law about which there was doubt, especially in matters of public interest . . . . The orthodox view of *amicus curiae* was, and is, that of an impartial friend of the court -- not an adversary party in interest in the litigation . . . . The position of classical *amicus* was not to provide a highly partisan account of the facts, but rather to aid the court in resolving doubtful issues of law." U.S. v. Michigan, 940 F.2d at 164-65.

Although an *amicus* need not be entirely disinterested, "courts have frowned on participation which simply allows the *amicus* to litigate its own views . . . or to simply present its version of the facts." American Satellite Co. v. United States, 22 Cl. Ct. 547, 549 (1991) (denying leave to appear as *amicus*). Here, AHA's proposed brief responds to the United States' and Relator's complaint and briefs as if AHA was litigating on Quorum's behalf.

In order for a proposed *amicus* brief to be helpful, it should be submitted by a friend of the Court, not a friend of a party-litigant. In Ryan v. Commodity Futures

Trading Commission, 125 F.3d 1062 (7th Cir. 1997), Judge Posner was presented with a similar request for leave to file an *amicus* brief by a partisan trade association, of which the petitioner was a member. Judge Posner denied leave to file on the ground that the brief merely duplicated the arguments made by the petitioner in his briefs, reasoning that:

> The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such *amicus* briefs should not be allowed. They are an abuse. The term "*amicus curiae*" means friend of the court, not friend of a party. We are beyond the original meaning now; an adversary role of an *amicus curiae* has become accepted. But there are, or at least there should be, limits. An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case), or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an *amicus curiae* brief should be denied.

Id. at 1063 (emphasis added; citations omitted). "Perhaps the most important [factor] is whether the court is persuaded that participation by the *amicus* will be useful to it, as contrasted with simply strengthening the assertions of one party." American Satellite v. U.S., 22 Cl. Ct. at 549.

In determining whether leave should be granted to participate as an *amicus*, AHA's interest should be considered. A trade association which weighs in on

litigation in support of its member must be viewed as an interested party to that litigation. "When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate for one of the parties to the litigation, leave to appear *amicus curiae* should be denied." Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 82 (D.N.J. 1993) (citations omitted). In Liberty Lincoln, the court denied the motions to appear as *amici curiae* of two car dealers' trade associations, concluding that "[a]t best, the information and arguments presented by [the trade associations] merely repeat the arguments already submitted by [the parties]." Id. at 83.

Where the parties are adequately represented, the need to accept *amicus* briefs is "particularly questionable." United States v. Gotti, 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (noting also that the proposed *amicus curiae* "has come as an advocate for one side . . . . In doing so, it does the court, itself and fundamental notions of fairness a disservice."); Fluor v. U.S., 35 Fed. Cl. at 285 (denying motion for leave to file an *amicus* brief, noting that both sides were adequately represented); American Satellite v. U.S., 22 Cl. Ct. at 549 ("[p]articipation by an *amicus curiae* is indicated, on the other hand, if the court is concerned that one of the parties is not interested in or capable of fully presenting one side of the argument"); Village of Elm Grove v. Protter, 724 F. Supp. 612, 613 (E.D. Wisc. 1989) (denying trade association leave to appear as *amicus* where it appeared "both parties are competently represented"); Donovan v. Gillmor, 535 F. Supp. 154,

159 (N.D. Ohio), appeal dismissed without op., 708 F.2d 723 (6th Cir. 1982) ("absent joint consent of the parties, acceptance of an intervenor as *amicus curiae* should be allowed only sparingly, unless the *amicus* has a special interest, or unless the Court feels that existing counsel need assistance."). Here, there is no question as to the adequacy (and quantity) of Quorum's representation. The brief proffered by AHA is neither helpful, timely, or otherwise necessary to the administration of justice.

III. AHA SHOULD NOT BE GRANTED LEAVE TO FILE ITS PROPOSED *AMICUS* BRIEF

AHA's proposed brief cannot be helpful to the Court in its consideration of Quorum's consolidated motions to dismiss. In ruling upon a motion to dismiss, a trial court is required to "construe the complaint broadly, accepting all facts pleaded therein as true and viewing all inferences in a light most favorable to the plaintiff." Public Citizen, Inc. v. Miller, 992 F.2d 1548 (11th Cir. 1993), citing Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733 (1964); Oladeinde v. City of Birmingham, 963 F.2d 1481, 1486 (11th Cir. 1992), cert. denied, 507 U.S. 987, 113 S.Ct. 1586 (1993). AHA's proposed brief contains unsupported assertions of fact and opinion regarding industry practices that are inappropriate for consideration by the Court at this stage of the litigation.

Most importantly, AHA's proposed brief is based upon a misunderstanding of the complaint. AHA states that

> The gist of the Government's allegations in this lawsuit is

> that the practice, followed by hospitals throughout the health care field, of preparing reserves for reimbursement by the Government without providing those reserves and the supporting materials to a fiscal intermediary renders the filed cost reports actionable under the False Claims Act.

AHA's Proposed Brief, page 9. This, of course, is not true. The complaint alleges that Quorum, as a matter of policy or practice, knowingly withheld or concealed information regarding presumptively non-reimbursable costs contained in its cost report, in violation of regulations promulgated prior to the time frame of the complaint. Complt. ¶¶ 69, 75, 77, 86, 172.

Based upon its mis-characterization of the complaint, AHA's proposed brief advocates a *per se* rule that providers are not required to disclose reserve account documentation at the time the cost report is filed, see AHA's Proposed Brief, pages 9-12, argues that retrospectively requiring the routine disclosure of a provider's reserve account documentation would expose providers to unexpected liability for fraud, see AHA's Proposed Brief, pages 12-13, and argues that the Government seeks a change in disclosure requirements that should first be subject to the notice and comment provisions of the APA. See AHA's Proposed Brief, pages 13-16.

AHA's proposed brief seeks advisory opinions on issues unrelated to the actual substance of the complaint. The complaint does not allege that "the . . . failure to provide reserve calculations and work papers as part of a cost report . . . give[s] rise to an inference of fraudulent conduct," as AHA appears to believe. See AHA's Proposed Brief, page 12. Rather, the complaint alleges, *inter alia*, that

Quorum's policy or practice of concealing or withholding information related to costs Quorum knew would probably be denied if discovered rendered its certifications false. Complt. ¶¶ 59 & 83-93, 324-326.

The concealment in this case is evidenced to a remarkable degree by the information contained in Quorum's reserve cost reports, work papers, and summaries. Nonetheless, it would be no less of a violation of the False Claims Act had Quorum decided instead, as a matter of corporate policy or practice, to conceal the pertinent information in memoranda, meeting minutes, or other types of documents. To the extent that AHA seeks a *per se* rule to inoculate providers, like Quorum, from False Claims Act liability for the concealment in reserve documentation of information related to non-reimbursable costs, such a rule would be inconsistent with the applicable cost report disclosure regulations and the Eleventh Circuit's ruling in Calhoon. A proposed *amicus* brief that seeks a change in existing law cannot be helpful to this Court.

AHA acknowledges that presumptively non-reimbursable costs contained in the cost report must be disclosed by filing the cost report under protest. See AHA's Proposed Brief, page 7. Thus, except for those providers that have concealed presumptively non-reimbursable costs in reserve accounts or other documentation, the denial of Quorum's consolidated motions to dismiss should not result in an "unexpected" liability for AHA's members. See AHA's Proposed Brief, pages 12-13. Nonetheless, AHA fails to explain how a liability reflected in a reserve account can

ever be an "unexpected" liability. The purpose of reserves is to account, and set aside funds, for such liabilities. Thus, the denial of Quorum's pending motions could not result in an unexpected liability for other providers engaging in the same or similar conduct.

AHA's proposed brief argues that the allegations against Quorum constitute a "sea change" in long-standing policy that should be subject to the notice and comment provisions of the APA. See AHA's Proposed Brief, pages 13-16. There has been no change in policy whatsoever. Since 1973, providers have been required to "furnish such information to the intermediary as may be necessary to . . . [a]ssure proper payment by the program . . . ." 42 C.F.R. § 413.20(d)(1); Calhoon, 97 F.3d at 528. As noted above, this regulation was promulgated in accordance with the APA's notice and comment procedures 27 years ago.

The APA argument contained in AHA's proposed brief results from a faulty premise. The complaint applies established cost-reporting disclosure requirements to the facts of this case. The Eleventh Circuit did not cause a sea change in long-standing policy when it applied the disclosure regulation to the facts of Calhoon in 1996. Id. Similarly, the application of this regulatory disclosure requirement to the facts of this case cannot constitute a rule-making subject to the APA; AHA's proposed brief does not cite to a single case in support of such a novel proposition.

In addition, AHA's *amicus* brief is untimely. Rather than file this brief contemporaneous with the April 1999 filing of Quorum's consolidated motions, AHA

filed this brief four months later, after the United States and Relator had filed their responses to Quorum's motions. See United States v. Asarco Inc., 28 F. Supp. 2d 1170, 1181 (D. Idaho 1998) (denying leave to file untimely *amicus curiae* briefs). Therefore, at this late date, AHA's attempt to befriend the Court should fail.

IV. CONCLUSION

For all of the foregoing reasons, AHA's motion for leave to participate in this lawsuit as *amicus curiae* should be denied.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

DONNA A. BUCELLA
United States Attorney

MICHAEL F. HERTZ
JOYCE R. BRANDA
ARNOLD M. AUERHAN, Trial Counsel
DAVID M. GOSSETT
U.S. Department of Justice, Civil Division
P.O. Box 261, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-0278
Fax: (202) 514-0280

Attorneys for the United States

Date: September 22, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing **UNITED STATES' RESPONSE TO MOTION OF THE AMERICAN HOSPITAL ASSOCIATION TO APPEAR AS AMICUS CURIAE** to be served upon the counsel listed below by first-class mail, postage prepaid, this 22nd day of September, 1999:

Charles R. Work, Esq.
Ankur J. Goel, Esq.
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
Fax: (202) 756-8087

W. Christian Hoyer, Esq.
James, Hoyer, Newcomer,
Forizs & Smiljanich, P.A.
One Urban Centre, Suite 147
4830 W. Kennedy Blvd.
Tampa, FL 33609
Fax: (813) 286-4174

Peter W. Chatfield, Esq.
Phillips & Cohen
2000 Massachusetts Ave, N.W.
First Floor
Washington, D.C. 20036
Fax: (202) 833-1815

Benjamin H. Hill, III, Esq.
Hill, Ward & Henderson, P.A.
101 E. Kennedy Blvd., Suite 3700
Tampa, Florida 33602
Fax: (813) 221-2900

Richard D. Raskin, Esq.
James C. Dechene, Esq.
Sidley & Austin
One First National Plaza
Chicago, IL 60603
Fax: (312) 853-7036

James D. Dasso, Esq.
Fredric J. Entin, Esq.
Jeffrey A. Soble, Esq.
Foley & Lardner
One IBM Plaza
330 North Wabash Avenue
Suite 3300
Chicago, IL 60611
Fax: (312) 755-1925

Troy M. Lovell, Esq.
Foley & Lardner
100 North Tampa
Suite 2700
Tampa, FL 33602
Fax: (813) 221-4210

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